NO. 33873

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DARRELL V. McGRAW, JR., ATTORNEY GENERAL, ex rel. STATE OF WEST VIRGINIA; THE WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY; and THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Petitioners/Plaintiffs Below,

v.

THE AMERICAN TOBACCO COMPANY; et al.,

Respondents/Defendants Below.

APPELLANT'S BRIEF

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Plaintiffs/Appellants,

v.

THE AMERICAN TOBACCO COMPANY; et al.,

Defendants/Appellees.

APPELLANT'S BRIEF

I.

KIND OF PROCEEDING AND NATURE OF LOWER COURT'S RULING

In 1994, Attorney General McGraw filed suit in Kanawha County Circuit Court ("the MSA Court") against the major tobacco companies seeking damages incurred by the State as a result of those Defendants' sale and marketing of tobacco products in the State. West Virginia was one of the first States to bring such a suit.

After years of litigation, West Virginia, forty-five other States, the District of Columbia, the Commonwealth of Puerto Rico, and four United States territories (the Settling States) entered into a comprehensive "Master Settlement Agreement"("the MSA") which released past and future claims by the above governmental entities against the original participating manufacturers[1] for the recovery

[1] Under the MSA, the Defendant Tobacco Companies are termed "Original Participating Manufacturers" ("OPMs"). The MSA allowed other tobacco companies not named as Defendants to join the agreement, and those that did join are "Subsequent Participating Manufacturers" ("SPMs"). The Original Participating Manufacturers and the Subsequent Participating Manufacturers are collectively

of health care costs that the Settling States attributed to smoking-related illnesses.[2] Under the MSA, each settling state was obligated to tender the agreement to the MSA court in each respective jurisdiction for the MSA Court's approval and entry of a consent decree.

On December 11, 1998, the Circuit Court of Kanawha County entered a Consent Decree, approving the settlement and incorporating the MSA's terms and provisions. Pursuant to the Consent Decree and MSA, the Circuit Court of Kanawha County retained jurisdiction for purposes of implementing, interpreting and enforcing the Consent Decree and the MSA.

Each year on April 15, the PMs make a single nationwide payment into an escrow account, the amount of which is calculated and determined annually by an "Independent Auditor". The Auditor then allocates the total amount received individually to the Settling States according to the MSA's allocation provision. However, under the terms of the MSA, the PMs are entitled to a reduction in their 2003 payments owed to the Settling States, provided certain conditions are met, which is the Non-Participating Manufacturer Adjustment ("NPMA")[3]. It is uncontroverted that West Virginia will not receive an adjustment in its payments which will reduce the amount of money to be received if it is determined that West Virginia diligently enforced its qualifying statute found at West Virginia Code Section 16-9B-3[4], which will be discussed more fully herein.

"Participating Manufacturers" ("PMs"). Tobacco companies that did not join the agreement are "Non-Participating Manufacturers" ("NPMs").

[2] Florida, Mississippi, Texas, and Minnesota settled their cases on an individual basis with the tobacco companies. *State ex rel. Rogers v. Philip Morris, Inc.*, 2008 WL 2854536, 1 n.1, 2008-Ohio-3690 ¶ 2 n.1 (Ohio Ct. App.).

[3] In this case there is no dispute that the PMs have lost market share and that the Master Settlement Agreement contributed to the market share loss which factors must also be met before there is a NPMA.

[4] The State's qualifying statute is almost identical to the Model Statute to the MSA. The Model Statute requires any tobacco product manufacturer whose cigarettes are sold in the State either to be a PM

The Tobacco Companies contend that the Auditor is required under the MSA to determine each year whether the diligent enforcement exemption to the NPMA applies to the Settling States. The Auditor refused to make the diligent enforcement determination for West Virginia or any Settling State contending that the Auditor was not charged with the responsibility under the MSA of making a determination regarding the diligent enforcement issue and was not qualified to make that legal determination.

Thereafter, an issue arose as a result of the PMs' efforts to significantly reduce their annual payments by exercising their alleged rights arising under the MSA's NPMA.

As a result, West Virginia filed a Motion for Declaratory Judgment in Kanawha County Circuit Court seeking a declaration that it had diligently enforced its qualifying statute during 2003. The State's Motion detailed a sampling of the many activities undertaken and conducted during 2003 to diligently enforce its qualifying statute. Instead of answering the Motion for Declaratory Judgment, the PMs filed a Motion to Compel Arbitration before one nationwide arbitration panel of three former federal judges and to Dismiss or, in the Alternative, Stay This Litigation ("Motion to Compel"). The Motion was joined by various SPMs. The PMs defined the issue to be decided by the Circuit Court as follows:

> This dispute concerns the application of an adjustment to the OPMs' April 17, 2006, annual Tobacco Master Settlement Agreement ("MSA") payment, known as the Non-Participating Manufacturer ("NPM") Adjustment. The "Independent Auditor" (as defined in the MSA) who calculates and determines Defendants' payment obligations made a determination that it would not apply the adjustment to the OPMs' April 17, 2006 payments. The OPMs

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under the MSA and generally perform its financial obligations thereunder or, if the company elects to be an NPM, to place into a qualified escrow fund a statutorily specified amount for each cigarette sold in the State.

> dispute that determination; the State defends it. Pursuant to the MSA's Arbitration Clause, this dispute must be heard in arbitration.

R. at 84.

West Virginia stipulated in the Circuit Court that the above dispute is subject to arbitration, but contended that the question of diligent enforcement was not arbitrable because no decision on diligent enforcement has been made by the Auditor or by anyone else. The PMs have yet to address the merits of the State's Motion for Declaratory Judgment or to assert that West Virginia did not diligently enforce its qualifying statute, which must occur before there is a dispute to arbitrate. Based upon West Virginia's stipulation, there is no existing dispute to arbitrate between West Virginia and the OMPs other than the dispute described above.

The PMs requested the MSA Court to require West Virginia to arbitrate not only the Auditor's refusal to apply the NPMA to the 2003 payment, but also West Virginia's contention that it diligently enforced its qualifying statute before one nationwide arbitration panel of three former federal judges. Nothing in the MSA explicitly provides for one nationwide arbitration. However, the lack of a basis for nationwide arbitration does not leave the parties without a remedy to resolve their impasse. As discussed herein, the Circuit Court is the arbitrator of due diligence.

Both the Consent Decree and Final Judgment ("Consent Decree") entered by the Circuit Court on December 11, 1998, and the MSA, incorporated by reference therein, expressly vest the MSA Court with "exclusive jurisdiction" over implementation and enforcement of the MSA. Pursuant to this broad grant of jurisdictional authority, West Virginia asked the MSA Court to find that the State took appropriate steps to diligently enforce its qualifying statute. Otherwise, West Virginia would have no means of coming forward and meeting its burden of establishing that it had

diligently enforced its qualifying statute before being required to go directly before one nationwide arbitration panel as the OMPs advocate.

The PMs asked the MSA Court to abdicate its broad jurisdictional powers, even as they readily admitted that the Independent Auditor was not equipped to answer the complicated mixed questions of fact and law involved in determining whether the State "diligently enforced" its qualifying statute. The accounting firm that serves as the MSA's Independent Auditor has expressly stated that it is *not* authorized or qualified to make this determination. Because a dispute to such a calculation or determination regarding diligent enforcement is a condition precedent to the invocation of the Auditor Arbitration Clause, its nonexistence was fatal to the PMs' Motion.

In addition, while much of this brief deals with the language contained in the MSA and the Consent Decree regarding arbitration, additional grounds for denying the Motion to Compel existed in an entirely separate contract, the so-called "Star Agreement", which contains absolutely no reference to arbitration. As such, the MSA Court should have retained jurisdiction over all matters related to that contract.

The PMs urged the Circuit Court to gauge the parties' contractual intentions by evaluating the "chaos" that would supposedly result if the nationwide arbitration they requested was not ordered. Through this means, the PMs sought and succeeded in diverting the Circuit Court's attention from the proper legal focal point– the plain language of the MSA and the Consent Decree, and in so doing, to erroneously compel arbitration before one nationwide arbitration panel. West Virginia seeks reversal of the circuit court's decision.[5]

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[5] The PMs asserted in their response to the petition for appeal that this case is not properly brought as an appeal but only as a petition for prohibition. An appeal, however, may be taken "from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but

II.

FACTUAL AND LEGAL BACKGROUND

The MSA payments are subject to several adjustments, one of which is a potentially substantial downward adjustment called the NPMA. Apart from the circumstances, if any, under which an NPMA can be *provisionally* applied to reduce a State's MSA payment, the Adjustment cannot be *ultimately* applied, *i.e.*, cannot be applied to reduce a State's payment finally and irrevocably, unless three conditions have been satisfied. Before an NPMA for any year can be applied to reduce a Settling State's MSA payment finally and irrevocably, the MSA Independent Auditor, PricewaterhouseCoopers ("PWC"), must first determine that a Market Share Loss occurred in the year preceding the payment year. Second, an independent economic consulting firm (the "Firm") must determine that the disadvantages resulting from the MSA were a "significant factor" contributing to the Market Share Loss (the "Significant Factor Determination"). Third, for any Settling State that has enacted a qualifying statute, there must be a determination that the State did not "diligently enforce" such statute during the year preceding the payment year.

The first two conditions have been satisfied for the year 2003 NPMA. The remaining condition turns on whether the Settling States, each of which had in effect throughout 2003, a so-

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fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties." W. Va. Code § 58-5-1. "Generally, an order qualifies as a final order when it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Durm v. Heck's, Inc.*, 184 W. Va. 562, 566, 401 S.E.2d 908, 912 (1991) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Here, once the circuit court granted the motion to compel, the declaratory judgment motion was nullified because the only relief that West Virginia sought in the declaratory judgment motion was the very relief that the circuit court's order granting arbitration denied it. Consequently, the circuit court's order was final. And, even if it was not final as to all issues and all parties, it was a final order in nature and effect as to the issue of arbitration–which also vests this Court with appellate jurisdiction. *See Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 549, 584 S.E.2d 176, 183 (2003) ("even if an order is not certified by a circuit court under Rule 54(b), it may nevertheless be considered 'final' if it approximates a final order in its nature and effect.").

called "Qualifying Statute," diligently enforced the statute during the year. The State of West Virginia has moved its MSA Court for a declaratory judgment declaring that the State diligently enforced its qualifying statute in the year 2003.

A. The NPMA Generally.

The NPMA is potentially capable of reducing the PMs' annual payment by three times the percentage of market share lost in excess of a two-percent threshold. The total potential NPMA for 2003, is approximately $1.2 billion dollars, and West Virginia's allocable share of such Adjustment would be approximately $11 million dollars. Assuming West Virginia is found to have failed to diligently enforce its qualifying statute, West Virginia's loss is not capped at 11 million dollars; rather, West Virginia is at risk of losing its entire allocable share of approximately 58 million dollars for the year 2003. Plainly stated, a finding of lack of diligent enforcement by West Virginia, which is denied, would create a situation where other states who proved diligent enforcement could shift their portion of the NPMA to West Virginia and other states who were determined to not diligently enforce their qualifying statutes.

Because of the potential catastrophic results, the conditions precedent are stringent. The first two conditions are "national" conditions in that their outcome affects all States equally. Thus, for example, if the Significant Factor Determination for a given year was in favor of the States, *no* State's payment could be subjected to an NPMA for that year. Conversely, if the Significant Factor Determination favored the PMs, *every* State's payment would remain potentially subject to the NPMA. The diligent enforcement condition, however, is State-specific. Furthermore, the MSA provides that the laws of each separate Settling State shall govern that Settling State's "diligent enforcement" determination. *See* MSA § XVIII(n) [p. 135] (Exhibit A to Defendant's Original

Participating Manufacturers' Memorandum in Support of their Motion to Compel Arbitration and to Dismiss or in the Alternative, Stay this Litigation, R. at 79). The MSA provides for a state-specific inquiry into diligent enforcement as follows:

> A Settling State's Allocated Payment shall not be subject to an NPM Adjustment: (i) if such Settling State .... *diligently enforced* the provisions of [its Qualifying Statute] during [the relevant] calendar year, . . .

MSA § IX(d)(2)(B) [p. 63] (emphasis added). R. at 79. Furthermore, the MSA provides that the laws of each separate Settling State shall govern that Settling State's "diligent enforcement" determination. *See* MSA § XVIII(n) [p. 135]. R. at 79.

If some Settling States were found to have diligently enforced their qualifying statute in a given year, those States' shares of the NPMA would be reallocated to any States that had been found not to have diligently enforced their qualifying statutes during the year. MSA Article IX(d)(2)(C). R. at 79. On the other hand, if all States were found to have diligently enforced during the year, no State's payment could be subjected to the NPMA. In short, once the first two national conditions to an NPMA have been met, whether and to what extent individual States will have to bear the Adjustment depends on State-by-State diligent enforcement determinations.

B. The 2003 NPMA.

The NPMA at issue is the 2003 NPMA, which was potentially applicable to the payments due April 15, 2004. In calculating those payments due, the Independent Auditor determined that a Market Share Loss had occurred in 2003.[6] Thus the first national condition to any ultimate

[6] The Independent Auditor also determined that PMs who joined the MSA within the first 14 days after the MSA's effective date had shipped fewer cigarettes in 2003 than in 1997, thereby satisfying a condition to the NPM Adjustment related to the Market Share Loss condition.

application of the NPMA had been met. However, the Firm had made no national Significant Factor Determination. Secondly, although every Settling State had a qualifying statute in effect in 2003, there had been no individual determinations as to whether or not any State had diligently enforced its qualifying statute in 2003. In fact, no proceeding to arrive at such a diligent enforcement determination had even commenced anywhere.

Faced with this situation, the Independent Auditor took the position that, irrespective of what the Firm's Significant Factor Determination might be, because all States had a qualifying statute in full force and effect in 2003, "no possible NPMA is allocated to PMs [Participating Manufacturers]." PWC Notice No. 130, p.2, n.1 (Exhibit J to Defendants' Memorandum). R. at 79.

On March 27, 2006, the Firm made the Significant Factor Determination in favor of the PMs for the 2003 Market Share Loss, thereby satisfying the second national condition to ultimate application of the 2003 NPMA. The PMs then urged that the NPMA be applied to reduce their payments due April 17, 2006. However, the Independent Auditor, in calculating those payments due, recognized that there still had been no individual determinations that any State had not diligently enforced its qualifying statute in 2003 and continued to decline to apply the 2003 NPMA provisionally to the PMs' payments, adding that:

> The Independent Auditor *is not charged with the responsibility under the MSA of making a determination regarding this [diligent enforcement] issue. More importantly, the Independent Auditor is not qualified to make the legal determination as to whether any particular Settling State has "diligently enforced" its Qualifying Statute.* . . . Until such time as the parties resolve this issue or the issue is resolved by a trier of fact, the Independent Auditor will not modify its current approach to the calculation.[7]

[7] The mechanism that was proposed by the PMs for applying the 2003 NPM Adjustment was an offset to their payments due April 17, 2006 in the amount of the Adjustment. PWC Notice No. 185 was a preliminary

West Virginia does not dispute that PWC's determination regarding the provisional application of the total adjustment is arbitrable–it does dispute the circuit court's decision that determinations regarding diligent enforcement are arbitrable at any point before (1) the Independent Auditor or the circuit court has determined whether West Virginia has diligently enforced its qualifying statue; and then, (2) either the PMs or West Virginia disputes that decision.

C. The PMs' Annual MSA Payment, Disbursement of the Payment to the States, and Subsequent Modification of the Payment.

The MSA's payment structure, insofar as relevant to the Diligent Enforcement Dispute, begins with the Independent Auditor calculating the amount due from the PMs (totally and individually) on or about April 15 of each year. This calculation is based on information received from the PMs and the Settling States and on public information. MSA subsections XI (d)(1)-(4). R. at 79. At the same time and based on some of the same information, the Independent Auditor determines how the total PM payment is to be allocated among the Settling States. *Id.*

However, the Independent Auditor does not have all the determinations or information necessary for making its calculation prior to the April due date. Moreover, frequently, some aspect of the calculation is disputed. For these reasons, the calculation is provisional. As determinations are made or information becomes available or disputes are resolved, the Independent Auditor will issue revised calculations increasing or decreasing the PMs' payment and making corresponding

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calculation of this payment due April 17, 2006. In its final calculation of the payment, the Independent Auditor again declined to "modify its current approach to the application of the NPM Settlement Adjustment." State's Exhibit 1 to Memorandum of the State of West Virginia in Opposition to the Original Participating Manufacturers' Motion to Compel Arbitration and to Dismiss or, in the Alternative, Stay this Litigation, R. at 162-212.

changes in allocating the modified payment to the States. MSA subsection XI(i). R. at 79. Again, the State concedes that these accounting determinations should be submitted to arbitration.

D. The Star Settlement.

As detailed in the State's Motion for Declaratory Judgment, pp.10-11, in 2003, settlement negotiations were ongoing between the Settling States, the OPMs and various SPMs concerning a range of issues regarding the MSA payments. As part of the comprehensive settlement agreements signed on June 18, 2003, the OPMs unconditionally released each Settling State from any and all claims that they ever had under Section IX(d) of the MSA with respect to cigarettes shipped or sold during 2002, including any effect such claims may have on the NPMA in 2003. Under the qualifying statute, NPMs are required to place money into escrow accounts each April 15th, based on their cigarette sales in the *preceding* year. Collection of NPM escrow payments in 2003 could only be conducted against NPM cigarettes *sold* in 2002. Having released claims for cigarettes sold in 2002, the OPMs can not now assert a lack of diligent enforcement in the collection of escrows based on such sales. *On the other hand, a separate settlement with the SPMs did not contain such a sweeping release.*

The MSA Court has utterly ignored the ramifications of this settlement contract. This settlement contract is independent of the MSA and has no arbitration clause at all. As a result, no arbitration panel has the authority or jurisdiction to determine its import and meaning in the context of diligent enforcement litigation.

III.

ASSIGNMENTS OF ERROR

A. **WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT THE QUESTION OF WHETHER THE STATE OF WEST VIRGINIA "DILIGENTLY ENFORCED" THE QUALIFYING STATUTE IS ARBITRABLE UNDER THE CIRCUMSTANCES THEN EXISTING.**

B. **WHETHER THE CIRCUIT COURT ERRED IN FAILING TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW WHEN IT DIRECTED NATIONWIDE ARBITRATION, OR, ALTERNATIVELY WHETHER THE CIRCUIT COURT ERRED SUBSTANTIVELY IN REQUIRING NATIONWIDE ARBITRATION NOTWITHSTANDING ITS FLAWED ORDER.**

C. **WHETHER THE CIRCUIT COURT ERRED IN IGNORING THE STATE'S POSITION ON THE EFFECT OF THE JUNE 18, 2003 SETTLEMENT AGREEMENTS.**

IV.

STANDARD OF REVIEW

The Petition for appeal involves the construction of a contract and is a pure matter of law. The standard of review is this matter is *de novo*.

> Since our decision in *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995), there can be no doubt that it is for a trial court to determine whether the terms of an integrated agreement are unambiguous and, if so, to construe the contract according to its plain meaning. In this sense, questions about the meaning of contractual provisions are questions of law, and we review a trial court's answers to them *de novo*. 194 W. Va. at 65 n. 23, 459 S.E.2d at 342 n. 23, citing *Thrift v. Estate of Hubbard*, 44 F.3d 348, 357-58 (5th Cir.1995).

Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W. Va. 97, 100, 468 S.E.2d 712, 715 (1996).

Consistent with this general rule, Courts have reviewed decisions to compel or deny arbitration *de novo*. *See, e.g., American Bankers Ins. Group Inc. v. Long*, 453 F.3d 623, 629 (4th

Cir. 2006) ("We generally review *de novo* the district court's decision on a petition to compel arbitration."); *Fleetwood Enterprises Inc. v. Gaskamp*, 280 F. 3d 1069, 1073 (5th Cir. 2002) ("This Court reviews *de novo* the grant or denial of a motion to compel arbitration."); *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 385 (6th Cir. 2005) ("This Court reviews *de novo* a district court's decisions regarding the arbitrablity of a particular dispute."); *Shriner v. Signal Fin. Co.*, 92 Fed. Appx. 322, 325 (7th Cir. 2003) ("We review *de novo* a district court's determination of whether a contract dispute is subject to arbitration pursuant to a written agreement.") *Bushley v. Credit Suisse First Boston,* 360 F.3d 1149, 1152 (9th Cir. 2004) *(*"The district court's decision to grant or deny a motion to compel arbitration is reviewed *de novo*").

V.

ARGUMENT

A. THE CIRCUIT COURT ERRED IN HOLDING THAT THE QUESTION OF WHETHER THE STATE OF WEST VIRGINIA "DILIGENTLY ENFORCED" THE QUALIFYING STATUTE IS ARBITRABLE UNDER THE CIRCUMSTANCES THEN EXISTING.

1. The State Seeks a Declaration that West Virginia Diligently Enforced the Qualifying Statute, and not Whether the Independent Auditor made Proper Calculations or Determinations.

The Motion to Compel is premised on the mistaken, but oft-repeated, assertion that the proceeding below involved a challenge to a determination made by the Independent Auditor.[8] The

[8] Concededly, the other courts that have addressed this issue have found the matter arbitrable. Such conclusions are not, of course, binding on this Court and have only such value as their reasoning justifies. *See Mohr v. County Court of Cabell County,* 145 W. Va. 377, 406, 115 S.E.2d 806, 821 (1960) (Haymond, J., dissenting) ("But whatever may be the effect of the decisions in the four cited cases, they are not binding but only persuasive authority to be accepted or rejected by the courts of this State as they may see fit to do.") This Court early in this century explicated, "no opinion should be controlled by the number of precedents

Independent Auditor has publicly stated that it is neither authorized nor competent to make the legal determination of diligent enforcement. In identical litigation in Kentucky, the OPMs have admitted as much. (*See* OPMs' Reply in Support of Their Motion to Compel Arbitration, *Comm. of Ky. v. Brown & Williamson Tobacco Corp.*,Case No. 98-CI-01579, (Franklin Circuit Court). State's Exhibit 2, R. at 162-212.)

The MSA retains jurisdiction and general oversight of the MSA. Pursuant to the Consent Decree and Judgment, "[j]urisdiction of this case is retained by the Court for the purposes of implementing and enforcing the MSA" in West Virginia. (Judgment, section VI(A)). Similarly, the MSA grants broad power to the MSA Court over disputes relating to implementation or enforcement:

> (a) *Jurisdiction.* Each Participating Manufacturer and each Settling State acknowledge that the Court: (1) has jurisdiction over the subject matter of the action ... in such Settling State and over each Participating Manufacturer; (2) shall retain *exclusive jurisdiction* for the purposes of implementing and enforcing this Agreement and the Consent Decree as to such Settling State; and (c) except as provided in subsections IX(d), XI(c) and XVII(d) ... shall be the *only court* to which disputes under this Agreement or the Consent Decree are presented as to such Settling State.

MSA subsection VII(a) (emphasis added). R. at 79.

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found in other jurisdictions. Nor should those precedents be persuasive unless founded upon sound reason." *Maxwell v. Maxwell*,67 W. Va. 119, __ 67 S.E. 379, 380 (1910). More recently this Court has explained that it "is more concerned with the persuasiveness of precedent than with the weight of precedent" and that it is "not bound by the mere weight of judicial precedent but rather by the rule which embodies the more persuasive reasoning." *Belcher v. Goins*, 184 W. Va. 395, 402, 400 S.E.2d 830, 837 (1990). *Accord State ex rel. Packard v. Perry,* 221 W. Va. 526, 539, 655 S.E.2d 548, 561 (2007). Where a decision from another court is in violation of fundamental principles, or flawed in its reasoning, this Court has not hesitated to eschew reliance on them. *See Hull v. Hull's Heirs*, 26 W. Va. 1, ___ (1885) ("These decisions are not binding authority on this Court; and on the points, on which they are relied we decline to follow them, because we regard them in violation of fundamental principles."); *see also Fayette County Nat. Bank v. Lilly*, 199 W. Va. 349, 354 n.8, 484 S.E.2d 232, 237 n.8 (1997).

The MSA Court is expressly authorized to enforce or construe the MSA "with respect to disputes, alleged violations or alleged breaches within [West Virginia]." MSA subsection VII(c)(1). R. at 79. The MSA specifies that (with an exception not pertinent here) West Virginia law governs all disputes involving West Virginia. MSA subsection XVIII(n). R. at 79. In December of 1998, the MSA Court approved the MSA in the Consent Decree, which provides that:

1. this Court "has jurisdiction over the subject matter of this action and over each of the Participating Manufacturers"; (Consent Decree § I);

2. jurisdiction over the case "is retained by the Court for the purposes of implementing and enforcing the Agreement and this Consent Decree and Final Judgment and enabling the continuing proceedings contemplated herein"; (Consent Decree § VI);

3. the parties "may apply to the Court at any time for further orders and directions as may be necessary or appropriate for the implementation and enforcement" of the Consent Decree. *Id.*

By the explicit terms of the Consent Decree and Judgment and the MSA, the MSA Court was intended by the parties to resolve all State-specific disputes that arise under the MSA.

The MSA contains a few narrow exceptions to this broad grant of general jurisdiction and judicial authority to resolve disputes. The exception relied upon by the OPMs in their Motion is set forth in subsection XI(c):

> Resolution of Disputes: Any dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the Independent Auditor (including, without limitation, any dispute concerning the operation or application of any of the Adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX(j) or subsection XI(i)) shall be submitted to binding arbitration before a panel of three neutral arbitrators, each of whom shall be a former Article III federal judge ... The arbitration shall be governed by the United States Federal Arbitration Act.

MSA subsection XI(c)(emphasis added). R. at 79. The dispute here, however, is whether a determination has to be made whether West Virginia diligently enforced the qualifying statute before it is compelled to arbitrate that issue.

Whether a dispute is one that is covered by the terms of an arbitration agreement is a legal question for a West Virginia court to determine. "' [W]hether or not [a party is] bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.'" *John Wiley & Sons v. Livingston*, 376 U.S. 543, 547 (1964) (quoting *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962)). The validity of the MSA's carve out arbitration provision *is not in dispute*. Whether or not the State's Motion seeking a diligent enforcement determination is within the scope of the arbitration provision prior to a determination of the diligent enforcement question *is in dispute*. When the Auditor who Appellee claims is charged with making that determination has refused to decide whether the diligent enforcement exemption applies to West Virginia, then the MSA Court should make that determination.

Acknowledging that the law favors settlement of disputes by arbitration, the West Virginia Supreme Court has nonetheless admonished courts to be careful not to extend an arbitration agreement by implication beyond the clear, express and unequivocal intent of the parties as manifested by the writing itself.

> The applicable law makes clear that the Federal Arbitration Act applies to agreements to arbitrate and does not apply to any contract or any provision of a contract that excludes arbitration. See *AT & T Techs., Inc., v. Communications Workers of America*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (holding that the arbitration clause does not cover disputes specifically excluded by contract language); *Choice Hotels Int'l, Inc., v. BSR Tropicana Resort, Inc.*, 252 F.3d 707 (4th Cir.2001) (determining collection action exemption to arbitration agreement to be valid); *Long-Airdox*

> *Co. v. International Union United Auto. Aerospace & Agric Implement Workers of America (UAW), Local 772*, 622 F.2d 70 (4th Cir.1980) (recognizing validity of exclusion from arbitration of no-strike clause of collective bargaining agreement). *"Parties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication." Daimler Chrysler Corp. v. Franklin*, 814 N.E.2d 281 (Ind. Ct. App.2004) (citing *Showboat Marina Casino P'ship v. Tonn & Blank Constr.*, 790 N.E.2d 595 (Ind. Ct. App.2003)).

State ex rel. City Holding Co. v. Kaufman, 216 W. Va. 594, 598, 609 S.E.2d 855, 859 (2004)(emphasis added).

The relief requested by the State's Motion for Declaratory Judgment is for its MSA Court to adjudicate the proper legal standard to be applied in West Virginia for determining if the qualifying statute had been diligently enforced and, applying that standard to make a finding of fact that the qualifying statute was diligently enforced in 2003. Any national presumption applied by the Independent Auditor with regard to the 2003 NPMA *vis-à-vis* the 2006 PM payments is immaterial to the MSA Court's ruling on the State's Motion.

Fundamentally, the Circuit Court should have denied the Defendants' Motion to Compel because the State's Motion for Declaratory Judgment does not call into question "calculations or determinations made" by the Independent Auditor. The Defendants' revisionist expansion of the Auditor Arbitration Clause wholly ignores its limited scope.

The Auditor Arbitration Clause strictly limits arbitrable disputes to those involving "calculations performed by, or any determination made by, the Independent Auditor." MSA § XI(c) [p. 88]. R. at 79. Stated conversely, the Auditor Arbitration Clause does not apply to issues not decided by the Independent Auditor, *i.e.*, West Virginia's diligent enforcement of its qualifying

statute. Plainly stated, the arbitrators have *no* original jurisdiction over matters the Independent Auditor has *not* calculated or determined.

The Independent Auditor has never made any determination that the State did or did not diligently enforce its qualifying statute. And it is that "diligent enforcement" issue that the State seeks to resolve in its Motion for Declaratory Judgment.

Significantly, the OPMs have admitted that this is not a determination the Independent Auditor even conceivably could make even though they contend that was what was contemplated and required in the MSA. (*See* OPMs' Reply in Support of Their Motion to Compel Arbitration, *Comm. of Ky. v. Brown & Williamson Tobacco Corp.*,Case No. 98-CI-01579, (Franklin Circuit Court). State's Exhibit 2, R. at 162-212.) Importantly, the Independent Auditor agrees with the OPMs' concession regarding the ability of the Independent Auditor to make a diligent enforcement determination. Indeed, it has expressly declined to make such a determination:

> The Independent Auditor is *not charged* with the responsibility under the MSA of making a determination regarding [the diligent enforcement] issue. More importantly, the Independent Auditor is *not qualified to make the legal determination* as to whether any *particular Settling State has "diligently enforced"* its Qualifying Statute. Additionally, the Independent Auditor is aware of certain litigation that is ongoing related to this issue. Until such time as the parties resolve this issue or the issue is resolved by a trier of fact, the Independent Auditor will not modify its current approach to the calculations.

(Notice ID 185 at 5, Mar. 7, 2006 (emphasis added), State's Exhibit 1, R. at 162-212).

2. The MSA Arbitration Provision is a Narrow Exception to the MSA Court's Otherwise Exclusive Power to Hear and Decide Disputes Arising Under the MSA.

The arbitration exception is limited to disputes over "calculations performed by, or any determinations made by, the Independent Auditor." MSA subsection XI(c). R. at 79. The Independent Auditor is required to be "a major, nationally recognized, certified public accounting firm jointly selected by agreement of the Original Participating Manufacturers and those Attorneys General of the Settling States who are members of the NAAG executive committee..." MSA subsection XI(b). R. at 79.

In short, to be arbitrable a dispute must be connected to something that the Independent Auditor has done. But the Diligent Enforcement question does not meet this test. The Independent Auditor has never made, nor purported to make, a determination as to whether West Virginia or any other State diligently enforced its qualifying statute in 2003. Indeed the Independent Auditor's only reference to diligent enforcement has been that it is neither:

> "charged with the responsibility under the MSA of making a determination regarding this issue . . . [nor] qualified to make the legal determination as to whether any particular Settling State has "diligently enforced" its Qualifying Statute."

PWC Notice No. 185, p. 5. State's Exhibit 1, R. at 162-212.

The PMs' position, however, is that the Independent Auditor has *presumed* that the Settling States had all diligently enforced their qualifying statutes in 2003, that the PMs dispute the correctness of that presumption, and that such dispute is arbitrable. Whether or not this position is valid is beside the point, however, because the Diligent Enforcement question sought to be arbitrated differs completely from the dispute over the Independent Auditor's alleged failure to *provisionally apply* the 2003 NPMA based on "presumptions". Rather, the Diligent Enforcement Dispute concerns a determination *on the merits* of whether the State diligently enforced its qualifying statute

in a given year – a determination that the Independent Auditor expressly refused to make for lack of authority, competence, and jurisdiction.

The PMs attempt to finesse this distinction by arguing that the MSA's arbitration provision broadly encompasses all "payment-related disputes" and that the Diligent Enforcement question is "payment-related" and hence arbitrable. In fact, the arbitration provision is a narrow carve-out from the Court's otherwise exclusive jurisdiction over MSA disputes, a carve-out requiring an Independent Auditor calculation or determination and one that is limited to disputes over such determination or calculation.

According to the PMs, the phrase "any dispute ... relating to ... any determinations made by the Independent Auditor" renders this a "broad" arbitration clause, subject to a strong presumption in favor of arbitration. However, the cases they cite are inapposite to the language used in the MSA. In the case of *State ex rel. City Holding Co. v. Kaufman*, 216 W. Va. 594, 598, 609 S.E.2d 855, 859 (2004), an employment contract contained similar expansive general language, however, the Supreme Court found that a "carve-out" provision nullified the compulsory arbitration provision insofar as it required arbitration regarding stock options. "The language is clear and unambiguous and effectively removes the stock options from the scope of the arbitration clause of the Severance Agreement." *Id.*, 216 W. Va. at 599-600, 609 S.E.2d at 860-861. Similarly, the language of subsection XI(c) limits the items referable to arbitration to the presumption adopted by the Independent Auditor which led to a provisional obligation on the part of the PMs to pay the States all the money, put a part of it into a disputed payments account, or preserve their rights to a potential future offset.

Importantly, "[w]here a narrow, rather than a broad, arbitration clause is involved, courts generally scrutinize the contract more closely to determine whether the parties intended that a particular dispute be arbitrated." *Mayor and City Council of Baltimore v. Baltimore City Composting Partnership,* 800 F. Supp. 305, 308 (D. Md. 1992). Here the provision is narrow.

Inclusion of terms such as "any dispute" "arising out of" and "relating to" in an arbitration provision does not render it a "broad" one. The key question in classifying an arbitration clause as "broad" or "narrow" is whether the clause applies to all disputes under an agreement, such that any dispute requiring interpretation of contract terms must be decided by the arbitrator. "Broad" clauses refer all disputes arising out of a contract to arbitration, while "narrow" clauses limit arbitration to specific types of disputes. The arbitration clause does not apply to all disputes arising under the MSA. The arbitrators' assignment to hear specific disputes relating to calculations made by the Independent Auditor is a narrow, limited exception to the general grant of power given to the MSA Court. In construing a narrow carve-out clause covering only specific issues, the court is to carry out the specific and limited intent of the parties, and not allow the federal presumption in favor of arbitration to have the same strong effect it has when construing a broad arbitration clause. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986); *Fuller v. Guthrie*, 565 F.2d 259, 261 (2d Cir. 1977).

B. THIS COURT SHOULD REMAND THIS CASE FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE CIRCUIT COURT EXPLAINING WHY IT ORDERED NATIONWIDE ARBITRATION, OR, ALTERNATIVELY IT SHOULD RULE THAT ANY MEDIATION MUST BE LOCAL.

Of course, should this Court conclude that arbitration of this matter is required, this Court must then address whether the arbitration must be local or national.

The Circuit Court's order in this cases addresses the issue of national versus local arbitration in one sentence, without making any findings of fact and conclusions of law, "The Parties' dispute concerning the 2003 NPM Adjustment, including the State's defense that it diligently enforced its 'Qualifying Statute' and is therefor exempt from the NPM Adjustment, must be arbitrated under the MSA's plain language before one nationwide arbitration panel of three former federal judges." R. at 327-328. The absence of such findings and conclusions renders the order fatally flawed.

This Court has held that a Circuit Court does not discharge its responsibilities in issuing an order–even an order subject to *de novo* review–unless that order includes findings of fact and conclusions of law sufficient to allow for intelligent appellate review. *See* Syl. Pt. 3, *Fayette County Nat. Bank v. Lilly,* 199 W. Va. 349, 350, 484 S.E.2d 232, 233 (1997) ("Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed."); *Rowe v. Grapevine Corp.,* 206 W. Va. 703, 719, 527 S.E.2d 814, 830 (1999) (observing that "[s]ince the lower court dismissed this claim of Plaintiffs summarily without any findings whatsoever, we are without a predicate basis for conducting a meaningful review of the ruling on this issue."); *accord Moore v. CNA Ins. Co.*, 215 W. Va. 286, 295, 599 S.E.2d 709, 718 (2004) (per curiam) (Maynard, C.J., concurring in part and dissenting in part) ("this Court cannot perform its function unless the circuit court's order contains both the factual and legal basis for its ultimate conclusion."). The Circuit Court's failure to justify its conclusion that West Virginia must submit itself to nationwide arbitration renders the court's order fatally flawed and this Court would be justified in remanding this case with directions to the Circuit Court to make such findings, include

such conclusions, and to properly analyze the interplay between the two. Of course, because it is clear that under the MSA any arbitration should be local, as opposed to national, this Court can simply remand for entry of an order directing local arbitration.

In stark contrast to the detailed formulas and criteria set out in the MSA to govern the Independent Auditor's national calculations of, for example, OPM payments (MSA §§ IX(c), XI(d)), market share loss (MSA § IX(d)(1)(B)), and adjustments (MSA §§ II(x), Exhibit C IX(d)), there are absolutely no formulas, criteria, or definition contained in the MSA with which to measure or evaluate "diligent enforcement." Because the MSA does not contain any such formulas, criteria, or definition, the matter is one that must be determined according to local law, which only makes sense.

> [W]hether there was diligent enforcement of the Qualifying Statute is a dispute which the courts of the various settling states . . . are most qualified to address. In an arbitration proceeding under the MSA, as many as 52 separate "Settling States", with competing interests, will be compelled to join in the selection of a single arbitrator, to sit with an arbitrator selected by the PMs, who share a unity of interest, and a third arbitrator selected by the first two. Moreover, the issue of "diligence" in enforcement of the Qualifying Statute is very much a local one. The vagaries of population size and distribution, geography, market penetration by NPMs, to name but a few factors, must be taken into account in determining whether a state has been diligent. Simply put: that which constitutes diligence in our sister state of North Dakota will assuredly be far different from diligence in our neighbor New York.

Commonwealth v. Philip Morris, Inc., 2006 WL 3792623, 3 (Pa. Ct. Common. Pleas).

Indeed, Article XVIII(n) of the MSA provides "(n) Governing Law. This Agreement (other than the Escrow Agreement) shall be governed by the laws of the relevant Settling State, without regard to the conflict of law rules of such Settling State." R. at 79. "Clearly, [West Virginia] is the relevant state with respect to whether [it] diligently enforced its Qualifying Statute during the year

in question." *State ex rel. Rogers v. Philip Morris, Inc.*, 2008-Ohio-3690 ¶ 70 (Ct. App. July 24, 2008) (Whiteside, J., concurring in part and dissenting in part). In analyzing this issue of local versus nationwide arbitration, not one court has referenced Article XVIII(n) of the MSA. On September 6, 2008, West Virginia conducted a WESTLAW research session in the ALLSTATES database employing the query "This Agreement (other than the Escrow Agreement) shall be governed by the laws of the relevant Settling State, without regard to the conflict of law rules of such Settling State." Only one citation was reported, *State ex rel. Rogers v. Philip Morris, Inc.*, 2008 WL 2854536, 2008-Ohio-3690 (Ct. App. July 24, 2008)–and, the quotation was not in the majority opinion, but in Judge Whiteside's concurring and dissenting opinion–where he found that Article VIII(n) weighed against the conclusion that the MSA contemplates a nationwide arbitration.[9] And Article VIII(n) is not the only provision in the MSA weighing strongly against a nationwide arbitration. Because this Court has "consistently maintained that a contractual agreement, to retain its intended meaning, must be read in its entirety[,]" *Wood v. Sterling Drilling and Prod. Co., Inc.*, 188 W. Va. 32, 34, 422 S.E.2d 509, 511 (1992) (per curiam); *accord* Syl. Pt. 4, in part, *White v. Bailey*, 65 W. Va. 573, 64 S.E. 1019 (1909) ("The purpose and object of the parties to a deed or other contract, as shown by the instrument itself, read as a whole, at the time of its execution, in the light of the subject-matter, the situation of the parties, and the circumstances surrounding them, constitute the safest and best guide to their intention."); *see also Restatement (Second) of Contracts* § 202(2) ("A writing is interpreted as a whole . . . ."), resort to these other provisions as interpretive guideposts is not only useful–it is compulsory.

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[9] On September 6, West Virginia also searched the ALLSTATES WESTLAW database using the query ("Master Settlement Agreement" & "xviii(n)") which produced an identical result.

Article VII(f) of the MSA contemplates that there will not necessarily be a single universal rule governing the MSA:

> The Attorneys General of the Settling States (through NAAG) shall monitor potential conflicting interpretations by courts of different States of this Agreement and the Consent Decrees. The Settling States shall use their best efforts, in cooperation with the Participating Manufacturers, to coordinate and resolve the effects of such conflicting interpretations as to matters that are not exclusively local in nature.

R. at 79.

And MSA Article VII(b) clearly evidences that the relevant state respecting whether that state enforced its Qualifying Statute is that state:

> Except as expressly provided in the Consent Decree, any Settling State or Released Party may apply to the Court to enforce the terms of the Consent Decree (or for a declaration construing any such term) with respect to alleged violations within such Settling State. A Settling State may not seek to enforce the Consent Decree of another Settling State; provided, however, that nothing contained herein shall effect the ability of any Settling State to (1) coordinate state enforcement actions or proceedings, or (2) file or join any amicus brief. In the event that the Court determines that any Participating Manufacturer or Settling State has violated the Consent Decree within such Settling State, the party that initiated the proceedings may request any and all relief available within such Settling State pursuant to the Consent Decree.

R. at 79.

Finally, the MSA draws sharp distinctions between group and individual processes in determining the NPMA. The selection of an economics firm to perform a significant factor determination is performed jointly by the OPM's, the Settling States, and the Attorney Generals of the Settling States and "shall be acceptable to . . . both the Original Participating Manufacturers and a majority of those Attorneys General who are both the Attorney General of a Settling State and a

member of the NAAG Executive Committee . . . ." MSA Art. IX(d)(1)(c). R. at 79. This language speaks of the collective groups by plurals. By contrast, the language of subsection IX(d)(2)(B) (emphasis added), allocating the NPMA, speaks to the singular and addresses states in their individual capacities– "*A* Settling State*'s* Allocated Payment shall not be subject to a NMP Adjustment: (I) if such Settling State continuously had a Qualifying Statute . . . . in full force and effect . . . ." R. at 79. The use of the indefinite article "A" before "Settling State's" indicates that the term "Settling State's" is singular. *Illich v. Merit Systems Protection Bd.*, 104 Fed. Appx. 171, 173 (Fed. Cir. 2004). This point is reinforced by the singular possessive "'s" in State's, which must be read as a singular, for to do otherwise, "would impute . . . ignorance of the elemental principles of the English language, in that it would make a singular possessive refer to a plural noun[.]" *Withers v. Commonwealth,* 65 S.E. 16, 18 (Va. 1909).

Thus, to claim that the MSA requires a nationwide arbitration is to ignore two facts: (1) that there is no such provision in the MSA and (2) that the provisions that are in the MSA clearly reveal that the MSA requires disputes to be settled on an individual Settling State basis utilizing the law of that Settling State as the governing law to be applied in making the determination. *Rogers*, 2008 WL 2854536 at 26, 2008-Ohio-3690 ¶ 82 (Whiteside, J., concurring in part and dissenting in part).

Moreover, any claim that there is some non-textual, efficiency and fairness reason to compel arbitration likewise fails. "The preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). "[T]his Court is not at liberty to rewrite the contract between the

parties[,]" *Kelly v. Painter,* 202 W.Va. 344, 348, 504 S.E.2d 171, 175 (1998), and therefore, "cannot transform the parties' agreement into a more cost-efficient contract after the fact." *Stone Distribution Co. v. Meyers* 157 F.R.D. 405, 409 (N.D. Ill.1994). "A . . . court must therefore abide by the terms of the parties' agreement, even if it produces inefficient results." *Philadelphia Reinsurance Corp. v. Employers Ins.*, 61 Fed. Appx. 816, 819 (3d Cir. 2003). The risk of inefficiencies, and even inconsistencies, "do not provide . . . the authority to reform the private contracts which underlie this dispute." *Government of the United Kingdom v. Boeing Corp.,* 998 F.2d 68, 74 (2d Cir. 1993). In the absence of an explicit agreement, a court cannot compel arbitration. *Philadelphia Reinsurance*, 61 Fed. Appx. at 821 n.4. But, if this Court could stray beyond the terms of the agreement and address the question in the first instance as a matter of policy, it would ineducably conclude that a local arbitration is most warranted.

First, in situations where state law provides the substantive rules governing the dispute, "there is an advantage in having it applied by federal judges who are familiar with the relevant law, and thus in trying the case in a district of the state or territory whose law is to govern." *Kendricks v. Hertz Corp.*, 2008 WL 3914135, 6 (D.V.I.). Second, West Virginia is the location where any pertinent documents and witnesses are situate so that efficiency is furthered in regard to the assembly and presentation of evidence rather than requiring West Virginia to produce documents and compel witness attendance in a faraway location. *Cf. Chicago Metallic Corp. v. Lee-Behrent Co.*, 1988 WL 72302, 1 (N.D. Ill.) ("The remaining factor to be considered is the interests of justice. The interests of justice may be served by a transfer to a district where the litigants are more likely to receive a speedy trial, or where federal judges are more familiar with the applicable state law."). This last point is of special notice.

Even if a "nationwide" arbitration was somehow convened, that proceeding would necessarily be immense and prove far more chaotic than the judicially-decided alternative. Fifty-two states and territories would have to transport their witnesses and documents to a central location perhaps many hundreds–if not thousands-of miles away from the repositories of these documents and the location of the witnesses. Conservatively estimating one week to present each of the fifty-two different diligent enforcement cases, the proceeding would take at least a year. In contrast to a judicial decision, the arbitration award resulting from that year-long proceeding would not bind the next arbitration panel considering the states' *2004* diligent enforcement efforts, which might or might not consist of the same arbitrators. Considering the time involved, the 2004 proceeding would have to follow immediately on the heels of the 2003 proceeding. Then, it would be time for the 2005 case, and so on. In other words, the arbitration once commenced would be perpetual, at enormous cost to the taxpayers of this and every other jurisdiction.

While this Court ruled in favor of arbitration in the case of *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002), it did implicitly reaffirm in that case that costs are a factor in determining whether or not to grant or deny a motion to compel arbitration.

> In light of these facts, we are unable to find that the employment contract at issue in this case was one of adhesion like that in *Dunlap*. Moreover, Mr. Wells has simply not shown that arbitration would be prohibitively expensive. As set forth above, the burden of proving excessive costs is upon the party challenging the arbitration provision. Syllabus Point 4, *Dunlap*.

State ex rel. Wells v. Matish, 215 W. Va. 686, 692, 600 S.E.2d 583, 589 (2004). Although the *Dunlap* case referenced in *Wells*, involved a contract of adhesion, the Supreme Court's willingness

to give Circuit Courts the duty to rule on the costs and deterrent effect upon a person seeking to enforce and vindicate rights and protections arising under state law is evidenced in the opinion:

> Provisions in a contract of adhesion that if applied would impose *unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable*; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court.

Syl. pt. 4, *State ex rel. Dunlap v. Berger*, *supra*. (emphasis added.) In this case, the public purse is at stake, as well as the right of the public to a ruling by the MSA Court regarding the State's diligent enforcement.

Finally, assuming that the Court agrees that the Independent Auditor should have made a diligent enforcement determination, it would appear that PMs would be hoisted on their own petard. If the Independent Auditor made a diligent enforcement determination, that decision would have been solely as to as to West Virginia–without the Independent Auditor considering any other state. Upon the Independent Auditor's determination, the "losing," *i.e.*, West Virginia or the PMs, could then go to arbitration–an arbitration involving *only* West Virginia and the Companies. The position that West Virginia advocates (assuming that it is forced to arbitrate) is the exact procedure that the Companies asserted should have been followed had the Independent Auditor actually ruled on diligent enforcement.

In sum, any argument that the MSA provides for a nationwide arbitration is unsupported by the text, context, and background of the MSA and is contradicted by the Companies' own arguments. If there is an arbitration in this case, it should be a local arbitration.

C. THE CIRCUIT COURT ERRED IN IGNORING THE STATE'S POSITION ON THE EFFECT OF THE JUNE 18, 2003 SETTLEMENT AGREEMENTS.

As previously set forth, the OPMs entered into comprehensive settlement agreements on June 18, 2003, unconditionally releasing the Settling States from any and all claims under Section IX(d) of the MSA with respect to cigarettes sold during 2002.

In this regard, the PMs make an annual payment under the MSA on April 15 of each year. The amount of that payment, and any applicable NPMA thereto, is based on Cigarette sales in the prior year. Thus, for example, MSA payments and escrow deposits made in April, 2004, are based upon Cigarettes sold by PMs and NPMs, respectively, during calendar year 2003.

Although the OPMs have refused to make their position as to West Virginia, or any jurisdiction, for that matter, known, it must be presumed, given the PMs' Motion, that the PMs intend to assert that they are entitled to a 2003 NPMA to the payment due in April, 2004, because West Virginia allegedly did not bring enforcement actions against the NPMs *during calendar year 2003.* Any such enforcement actions, however, could only relate to cigarette sales made by NPMs in West Virginia from 1999 through 2002. In 2003, West Virginia could not take any "enforcement" actions with respect to cigarette sales made *during* 2003 because it could not know until April, 2004 whether any NPM would fail to make its full escrow deposit for such sales. Rather, West Virginia, at most, could monitor the level of such cigarettes sold *during* 2003, and wait to see if the required escrow deposits were made in April 2004.

Thus, information with respect to sales from 1999 through 2002 is the only information on which West Virginia could initiate enforcement actions in 2003. However, the OPMs have waived their right to seek an NPMA to their 2004 annual payment based upon any claimed lack of "diligent enforcement" pertaining to cigarettes sold from 1999 to 2002. Specifically, the June 2003 Agreements resolved a variety of disputes that had arisen with respect to cigarette sales and MSA payments from 1999 through 2002.[10] As part of those agreements, the Settling States permitted the signatory PMs to reduce their payments for sales made during 1999, 2000, 2001 and 2002 by agreed-upon amounts, in return for which the PMs agreed, *inter alia*, to release the Settling States from any and all potential NPMA in 2003 and subsequent years based on claims pertaining to any cigarette sales during 1999 through 2002. Typical is the June 2003 Agreement signed by R.J. Reynolds (an OPM), which states in relevant part:

> RJRT absolutely and unconditionally releases and forever discharges each Settling State from any and all claims that it ever had, now has, or hereafter can, shall or may have under Section IX(d) of the MSA with respect to Cigarettes shipped or sold during 1999, 2000, 2001, and 2002, *including any effect such claims may have on future payments under the MSA.*

R.J. Reynolds Settlement Agreement, Para. 6, Comm. Motion for Enforcement/Declaratory Order, (Emphasis added.) State's Exhibit 9, R. at 162-212.

Thus, the OPMs released the Settling States from "any and all claims" they had under MSA Section IX(d) – which includes the NPMA payment provisions – with respect to Cigarettes shipped or sold from 1999 to 2002, including the "effect" that such claims might have "on future payments under the MSA." Accordingly, they are barred from alleging to the MSA Court that they are entitled

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[10] All four OPMs – Philip Morris, R.J. Reynolds, B&W and Lorillard – signed such agreements. In 2004, R.J. Reynolds and B&W merged their operations, and thus only three OPMs remain.

to a 2003 NPMA because West Virginia failed to "diligently enforce" the qualifying statute with respect to Cigarettes sold by the NPMs from 1999 to 2002. Instead, as to the OPMs, the only cigarette sales relevant to whether West Virginia "diligently enforced" the qualifying statute in 2003 are Cigarettes sold during calendar year 2002.

Under West Virginia law, settlement agreements are interpreted in accordance with rules of contract construction.

> Settlement agreements are to be construed "as any other contract," *Floyd v. Watson*, 163 W. Va. 65, 68, 254 S.E.2d 687, 690 (1979), and, as noted in syllabus point 1 of *Martin v. Ewing*, 112 W. Va. 332, 164 S.E. 859 (1932): "A meeting of the minds of the parties is a *sine qua non* of all contracts." Syl. pt. 2, *Sanson v. Brandywine Homes*, 215 W. Va. 307, 599 S.E.2d 730 (W. Va. 2004); syl. pt. 1, *Burdette v. Burdette Realty Improvement*, 214 W. Va. 448, 590 S.E.2d 641 (2003); syl. pt. 4, *Riner v. Newbraugh*, 211 W. Va. 137, 563 S.E.2d 802 (2002); syl. pt. 1, *Wheeling Downs Racing Association v. West Virginia Sportservice*, 157 W. Va. 93, 199 S.E.2d 308 (1973).

Triad Energy Corp. v. Renner, 215 W. Va. 573, 576, 600 S.E.2d 285, 288 (2004).

The June 2003 Settlement Agreements do not contain an arbitration provision and, thus, any and all issues relating to those agreements should have been decided by the Circuit Court, and not an arbitration panel. If the parties intended that controversies arising out of the interpretation or application of the global settlement agreements be subject to arbitration, they would have so stated in the agreements. The facts of this case is analogous to those in the case of *State ex rel. City Holding Co. v. Kaufman.* In that case, there also were two separate contracts: an employment contract (which contained a broad arbitration clause) and a stock options plan (which did not). The Supreme Court held that arbitration was not proper for those matters involving stock options. In this case, although it is the State's contention that the MSA and Consent Decree do not provide for

arbitration of diligent enforcement, it is indisputable that the Star Agreements contain no arbitration clause and are thus separate and distinct and not subject to arbitration.

It is West Virginia's contention that the OPMs absolutely and unconditionally released and forever discharged West Virginia from any and all claims that they ever had, now have, or hereafter can, shall or may have under Section IX(d) of the MSA with respect to the collection of escrow payments based on Cigarettes sold during calendar year 2002, including any effect such claims may have on future payments. Only the lower court could have determined the scope of the waiver, and West Virginia has asked for a judicial determination that the OPMs had waived their right to contest the State's diligent enforcement with respect to escrow payments based on Cigarettes sold prior to 2003.

Since this issue is an integral part of the relief sought by West Virginia in its Motion for Declaratory Order, and it is not an issue subject to arbitration, this Court should reverse the lower Court's ruling and deny the Motion to Compel. This is especially compelling in that the SPMs have not executed a similar waiver.

VI.

CONCLUSION

For the above reasons, the Circuit Court of Kanawha County should be reversed.

Respectfully submitted,

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NO. 33873

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DARRELL V. McGRAW, JR., ATTORNEY GENERAL,
***ex rel.* STATE OF WEST VIRGINIA;**
THE WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY; and THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Petitioners/Plaintiffs Below,

v.

THE AMERICAN TOBACCO COMPANY; *et al.*,

Respondents/Defendants Below.

CERTIFICATE OF SERVICE

I, Ronald R. Brown, Assistant Attorney General, do hereby certify that true copies of the foregoing "Appellant's Brief " were served upon the following by U.S. Mail, this 8th day of September, 2008, addressed as follows:

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